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FILED
SEP 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

no.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

SHELDON H. WEAVER et al, PETITIONER

v.

STATE OF NEW YORK, DEPARTMENT OF LAW,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
OF APPEALS FOR THE SECOND CIRCUIT

WRIT OF CERTIORARI

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starts pg 2

A. QUESTIONS PRESENTED FOR REVIEW

1. Is the only Defendant here today, the State of New York sueable under section 42 USCA 1983, where the Plaintiff has not named a State official as a party Defendant?

2. Did the courts below irr in never determining whether the appellants constitutional claim is a Government (State) action or a private action?

3. Did the lower courts decide the facts affirmatively and unequivocally, that the appellants constitutional claim can be brought in federal court only under 42 USCA 1983 and is subject to its limitations?

4. Can a subsequent action relieve the Government, the Defendant the State of New York of its duty to provide just compensation when their courts issue decrees with certain restraints that have already worked to deprive the Plaintiffs of property or the use of property without due process of law?

5. Can a subsequent action relieve the Government, the Defendant, the State of New York of its duty to provide just compensation to persons who sustained damages when their courts issue decrees with certain restraints that impaired obligations of contract and impaired an economic liberty to contract?

6. Is the decision of the lower court sanctioned by the court below legally correct since it is in conflict with the decisions of other federal appeals and

district courts on the same subject matter?

7. Whether the court below has so far departed from the accepted and usual course of federal proceedings and question of federal law and so far sanctioned such departure by a lower court, as to call for an exercise of this courts power of supervision of deprivations of citizens rights, privileges that are secured and protected by the constitution and laws of the United States.

B. A list of all the parties

The Petitioners Sheldon H. Weaver is the Plaintiff acting in several capacities, such as Majority stockholder of Weaver Manufacturing Inc., 991 Aero Drive Inc., major creditor of Weaver Manufacturing Inc.and Sheldon H. Weaver as

a individual and the respondent, the Defendant The State of New York, Department of Law is by title and is not made personally, but officially, no person in his natural capacity is brought before this court as a defendant.

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D. Opinions below

The court of appeals for the second circuit entered its order June 21, 1988 (A1-) affirming the lower district courts order and judgement granting the the State of New York its motion to dismiss appellants complaint and awarding the State of New York attorney's fees (A4) and on reconsideration (A8).

The judgements and orders are unreported, and both courts characterized the petitioners constitutional claim pursuit to 42 USC 1983 and time barred the matter.

Prior to the above the Petition in June 1985 first filed a class action for all persons who received an injury and the Defendants consisted of all the key players whose activities were connected to

the injunctions decrees, their process and their certain restraints, that complaint was also dismissed as claims to appear pursuant to 42 USCA 1983 as timed barred on SEptember 9, 1986 (A11) and thereafter a reconsideration and discovery motions were denied December 31, 1986 (A20-24).

The petitioner did not appeal the matter, but filed a similar complaint, before a brother court, dropping the class action, January 29, 1987, that court dismissed the matter but not as a claim to appear under section 1983 and time-barred the matter (A25).

Thereafter the petitioner re-designed a new complaint to a much more narrower action, naming the State of New York the only defendant here today, and that complaint was filed March 30,1987. When that matter came to be heard on July 28,

1987, the court was told sufficient facts and basis of law that the matter could not be dismissed (A28) (partial transcript of those proceeding held on July 28, 1987). Never the less the petitioners complaint was again dismissed as a claim to appear pursuant to section 42 USCA 1983 and timed-barred (A4).

The petitioner moved timely for a reconsideration, the petitioner told the court the section 1983 did not apply and the law involved by reading his oral argument from a in advance affidavit sworn to on October 9, 1987 (A33).

While the matter was heard and pending the petitioner moved for a reversal and a hearing on damages but the relief was denied and attorneys fees awarded to the state February 5, 1988 (A8).
Thereafter the court of appeals second circuit affirmed the matter (A1).

E. JURISDICTION

The judgement of the Court of Appeals was entered on June 21, 1988. The petitioner did not request a re-hearing. The jurisdiction of this court is invoked under 28 USCA 1254 (1).

F. CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional amendments of the United States are as follows:

Article 1, Section 10, "No State shall enter into law impairing the obligations of contract."

Article 14, Section 1, "No State shall deprive any person of life, liberty, or property without due process of law."

Article 6, Section 2, "State court judges are charged with the duty of following the constitutional of the United

Article 11, the doctrine of Sovereign Immunity".

Federal Statute 28 USCA 1352, Damages sustained by injunctions.

Federal Rule C.P. 65(1) 28 USCA, a party may bring independent action in State or federal courts, damages under the band rule where the court took no action with respect to liability the enjoined party can commend an independent action for recovery under 28 USCA65(c)

NYCPLR 6315 damages sustained by injunctions may be recovered.

G. STATEMENT OF THE CASE

Both the court of first instance and the court of appeals was offered (3) three federal questions that went unaddressed. (A-37).

The bases for federal jurisdiction in the court of first instances was and is mentioned in the petitioners complaint, and reads as follows:

Federal Statute 28 USCA 1331, The district court shall have original jurisdiction of all actions arisings under the constitution laws or treaties of the United States, and further,

Federal Statue 1441 (B) any civil action of which the district courts have original jurisdiction founded on a claim or right arising under constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence of the parties, and further,

Federal Statute 28 USCA 1988, "authorize application of State law in federal actions and gives recognition to

laws of the State pertaining to liability, and further,

Federal Statue 28 USCA 1352, The district court shall have origianl jurisdiction of any action on a bond concurrent with State courts, to hear suits on wrong full issued injunctions, and relating to bond provisions executed under any law of the United States regardless of amount in controversy or diversity of citizenship (C.J.S. 30), and further,

The Plaintiffs action is to recover on a liability created by the Federal Statue 28 USCA 1352.

A. Wrongfully issued injunctions

B. Damages of what injunctions have caused.

This action is an injunction suit independently of an injunction suit on a

bond as cited in C.J.S. volume 43 (A) section 300 "action for damages independently on a malicious prosecution of unconstitutional and fraudulently means as in the complaint more fully appears"

G. STATEMENT OF FACTS TO THE QUESTIONS

In this civil action, petitioner seeks monetary damages and other losses from the State of New York for the damaging effects of injunctions, their process and their certain restraints, issued by their courts involving violations of Article 1 Section 10, Article 14 Section 1 of the United States constitutional, that have already worked as a taking or causing a taking, absent of due process of law, all the Petitioners property, including other persons property who were never connected

to the underlying case of Weaver vs Weaver.

The exhibits A through L, mention hereafter are attached to the Plaintiffs complaint filed in March 1987.

The facts in the underlying case are as follows:

The underlying case has its roots stemming from a 1978 action for divorce in New York State Supreme Court, Erie county, brought on against the Plaintiff, Sheldon H. Weaver, by his then wife, Diane C. Weaver, that resulted in a judgement of divorce issued by the former Justice James L. Kane, by his memorandum decision dated August 24, 1979. Filed August 28, 1979 and thereafter granting an order on October 11, 1979 filed October 12, 1979.)

The Divorce matter is not the subject matter here today.

The subject matter here today involves injunctions, their process, their certain restraints and the damages caused as a direct result, collaterally to the divorce action, the State of New York its former agent Justice James L. Kane granted a Ex Parte application of August 8, 1979 enjoining Weaver Manufacturing Inc. with an individual defendant (Sheldon H. Weaver) in a separate and distinct (matrimonial) action exhibits A,B,C.

When granting the Ex Parte application, it contained a temporary restraining order making it illegal or unlawful for Sheldon H. Weaver to act in his lawful capacity as President, Director, or Majority Stockholder of Weaver Manufacturing Inc., or his agents to conduct a special stockholders meeting, and to the issuance of 100 shares of stock to Sheldon H.

Weaver in exchange of a small part of concellation of a large debt owed him by the corporation, a necessary step for arranging for re-financing of the corporation (ex A, par. 5, page 2&3).

Sheldon H. Weaver and his then attorney offered their opposing affidavits sworn to on August 9, 1979, ex. D and E.

Sheldon H. Weaver's affidavit gave notice to the court the following:

That Weaver Manufacturing Inc. lacked money to meet its financial obligations of contracts and agreements, and further:

Manufacturers Hanover Trust Company would provide the input of cash for Weaver Manufacturing Inc. to meet their financial commitments providing that the loan would be handled as a United States Small business guaranteed loan and the application was processed on that basis.

(among other matters)

The affidavit of counsel gave notice to the court the following:

That the court lacked jurisdiction over Weaver Manufacturing Inc., improper application, inappropriate for the court to grant relief of this nature as part of a matrimonial action., and further:

The issuance of an injunction by this court preventing Mr. Weaver, the defendant from taking action as President, Director or Majority Stockholder, to take the prepared steps to the issuance of the stock for the re-financing of the corporation will seriously be damaging to the corporation and Mr. Weaver and accordingly a substantial bond or undertaking should be required in connection with injunctive actions.

Never the less, no further application,

notice, hearing or trial, bond or undertaking, Justice James L. Kane issued his memorandum decision October 10, 1978 filed October 22, 1979 continuing the temporary restraining order and to remain in effect until the judgement of divorce is finalized by voluntary compliance of the parties or after appeal should either do so., ex. F.

Thereafter Justice James L. Kane granted an order on October 22, 1979 filed January 3, 1984., ex. G.

The order permanently enjoined Weaver Manufacturing Inc. with Sheldon H. Weaver, an individual defendant in a separate action, and impaired his ability to act in his capacity as president, director, or majority stockholder, from transferring encumbering, selling, or in any other manner effecting title or equitable

interest in Weaver Manufacturing Inc....until judgement of divorce is finalized by compliance...or after appeal....

The lawyers represented the parties incorporated this injunction with the divorce on an appeal, a year later and the appellate division fourth department continued the temporary restraining order until the defendant has made all payments due under the judgement of divorce, at which time Sheldon H. Weaver may move to vacate the injunction (Weaver V. Weaver 78 AD 2d 771 4th Dept. October 1980).

Prior to that appeal another matter was heard (Weaver V. Weaver 72 AD 2d 771 4th Dept. October 1980).

While the appeal of the divorce and temporary restraining order was pending, Justice James L. Kane granted an order to

show cause on May 8, 1980, which resulted in another Justice granting order finding Sheldon H. Weaver in contempt of the financial provisions of the judgement of divorce on or about December 1980, ex. J.

The order also directed Sheldon H. Weaver to pay as a fine $31,059.11 dollars in fifteen days or go to jail until said fine is paid., ex. J., page 5 & 6.

The order also directed a wage assignment pursuant to section 49-B wage assignment pursuant to section 49-B for payment of $150.00 dollars per week attacking Sheldon H. Weaver net wages of $250.00 per week (see first appeal 72 AD 2d 771)

The order also directed among other matters that while the 49-B wage assignment is in effect;, ex. J, page 8.

"That Sheldon H. Weaver shall be

permanently restrained and enjoined form transferring selling, disbursing, or effecting title in any manner what so ever to any of his real or personal property, and further, shall be restrained from voting his stock in Weaver Manufacturing Inc., or in any other corporation which he may own or control either directly or beneficially.

These injunction and their process, their certain restraints made it impossible for the corporations in issue to be manageable, inoperative to their functions and certainly financially unworkable, resulting in irreparable harm, injury and damages, ex. K, L and the Plaintiffs are entitled to a remedy. A federal court has a duty to fashion a remedy once a constitutional violation is found and is required to tailor the scope

of the remedy to fit the nature and extent of the constitutional violations and section 28 USCA 1352 provides that remedy.

J. REASONS FOR GRANTING THE WRIT

1. Where the Petitioner has received damages as the result of a public function of the State of New York, its courts issuing injunction decrees absent of Due Process of Law, with certain restraints that have already worked as taking or causing a taking of all the petitioner property and other persons property not connected to the underlying case, by restraints that impaired obligations of contract, impaired an economic liberty to contract and impaired other liberties that are in the nature of citizens rights, privileges that are secured and protected by the constitution and laws of the United

States, Due Process demands and requires a federal court once a constitutional violation is found to tailor the scope of the remedy to fit the nature and extent of the constitutional violations.

2. Where a possible due process violation is apparent on the particular facts of a case, the United States Supreme Court is empowered to consider the due process issue.

U.S. Wood V. Georgia Ga 101 S ct 1097 450 U.S. 261 67 LED 2d 230 on remand 280 SE 2d 439 158 Ga App 309

3. A construction of a Statute which would deny all opportunity for judicial determination of a constitutional right is not to be favored.

U.S. - Lockerty V. Phillips NJ 635 S ct 1019 319 U.S. 182 87 LED 1339.

4. The federal Statute 42 USCA 1983 as

applied in this case in connection with New York State personal injury Statute 214 (5) is in conflict with the State of New York, their own Statute 6315 ascertaining damages sustained by reason of preliminary injunctions or temporary restraining order and its provision that damages may be recovered by the person entitled there to in a separate action absent of any provisions of statutes of limitations and further:

5. In the case cited by the courts below Okure V. Owens 816 F. 2d 45 48 (2d cir 1987) (cert grated) 108 S. ct 1218 (1988) those facts and circumstances involve a tort action for the recovery of damages for personal injuries, therefore essentially irrelevant to the facts, law and circumstances in the Petitioners case heretoday, and the petitioners claim upon

the State is by title and is not made personally, but officially, no person in his natural capacity is brought before this court as a defendant.

6. The federal questions herein have been decided below in a way which is not in accord with the applicable decisions of this court.

A. In first Lutheran Church V. Los Angeles County 96 L Ed 2d 250 this court stated:

"No subsequent action by the Government... can relieve the government of the duty to provide compensation for the period during which the taking was effective...without payment of fair value for the uses of the property during the period in which the...was denied such use, would be a constitutional insufficient remedy". and further,

B. In Pennsylvania Coal V. Mahon Co. 260 U.S. 393 43 S. ct 158 67 L Ed 322 (1922) this court stated, involving a State Statute prohibiting the mining of coal in a certain way "The Supreme Court, per Justice Holmes, held that the rights of a coal company could not, consistent with the due process, be so limited without payment of compensation".

7. The federal questions herein has not heretofore been determined by the court.

C. This writ raises a novel questions relating to Article 1, section 10 of the constitution that limits the ability of State governments to take certain specific actions involving the provision prohibiting States from impairing the obligation of contracts that eliminate vested property rights.

8. D. Mention here aboye in paragraph 6,

sub paragraph A & B, their regulations went to far and worked as a taking here today injunctions decrees, their process and certain restraints went to far and have already worked as a taking.

9. The decisions of the court of appeals in this case conflicts with the decisions of other courts of appeals on the same subject matter.

Case Law cited from within the federal Statute 28 USCA 1352.

E. Losses directly attributable to the temporary injunction are recoverable Atomic Oil Co of Oklahoma V. Bordable Oil Co. 416 F 2d 1097 (10th cir 1969) lost profits notes 32 col L Rev 869 1932 73 Har. L Rev 333 1959.

F. Factors etc V. Pro Arts USDC SD NEW YORK NO. 77 Civ 4707 (cht) April 14, 1983. The court stated the matter is hereby

referred to the magistrate to conduct hearings on the amount of damages to which the parties are entitled and to submit a recommendation and further:

G. Buddy System Inc. V. Every Genie Inc. 545 FR 2d serie 1164 (1976) note 7932 a party may bring independent action in State or federal courts federal rule C.P. 65 (1) 28 USCA and note 238 Negation of damages under the bond rule where the court took no action with respect to liability the enjoyed party can commence an independent action for recovery under 28 USCA 65 (c).

K. CONCLUSION

Certiorari is warranted in order that a conflict in law as determined by the federal circuit may be resolved, and that the Petitioner may receive treatment

consistent with treatment afforded to other persons in cases with similar facts before other federal courts. This issue is of great importance to the Petitioner and other persons similarly situated who received an injury.

The availability of consistent relief through the federal courts from persons who's rights and privileges that are secured and protected by the constitution and laws of the United States will be effectively denied, unless the issues connected, that the Petitioner constitutional claim can be brought in federal court only under 42 USCA 1983 and subject to its limitations are finally determined with respect to recover damages of what injunctions have caused.

For the foregoing reasons, Petitioner requests that this court grant his

petition for a writ of certiorari, and summarily reverse the judgement below for further proceeding with respect to damages.

DATES SEPTEMBER 7,1988

Sheldon H Weaver

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed
June 21, 1988

Sheldon H. Weaver,
Appellant,
v. 88-7152
State of New York,
Appellee.

ORDER

Sheldon H. Weaver, pro se, appeals from an order of the United States District Court for the Northern District of New York, John T. Elfvin, Judge, granting the State of New York's motion to dismiss appellant's complaint and awarding the State attorney's fees. We affirm.

The graveman of appellant's complaint is that the damaging effect of injunctions issued by the New York State courts constituted an unlawful taking of his

property. As the district court correctly held, such a constitutional claim can be brought in federal court only under 42 U.S.C.§ 1983 and is subject to its limitations. The proper limitation to apply to all section 1983 claims in New York is three years, based on the State's general personal injury statute, New York Civil Practice Law & Rule § 214(5). See Okure V. Owens, 816 F.2d 45, 48 (2d Cir. 1987), cert.granted, 108 S. Ct. 1218 (1988). Here, the injunctions of which appellant complains were issued in 1979 and 1980. The instant action having been brought in 1987 was therefore time-barred. Nor do we find any basis in the record to support equitable tolling of the statute of limitations.

The award of attorney's fees was also proper. A defendant in a section 1983

action may recover such costs when the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Hughes v. Rowe, 449 U.S. 5, 14 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)). Appellant was warned by the district court in two memoranda issued in appellant's 1985 action, see Weaver v. State of New York, No. 85-746E (W.D.N.Y. Sept. 9, 1986); id. (Dec. 31, 1986) that sanctions would have been appropriate had appellant not been proceeding pro se. Appellant's continued pressing of the same frivolous claims and unfounded accusations is sufficient to support an award of attorney's fees.

Judgement affirmed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MAJORITY STOCKHOLDER OF WEAVER MFG.INC., AND MAJORITY STOCKHOLDER OF 991 AERO DRIVE, INC., et al.,

Plaintiff,

-vs-

THE STATE OF NEW YORK, DEPART OF LAW,

Defendants.

CIV-87-293E

MEMORANDUM and ORDER

The plaintiff seeks damages for "wrongly" issued injunctions granted in 1977 by then New York Supreme Court Justice James L. Kane as part of a matrimonial action. The defendants seek to dismiss based on the statute of limitations, on this Court's lack of jurisdiction, on res judicata and collateral estoppel and for failure to state a claim.

In 1985 the plaintiff commenced a suit in this Court[1] against, among others, the

defendants in this action. He complained of the same divorce proceedings and the same injunctions issued by Justice Kane that are the basis of the instant action. The defendants at that time move to dismiss for the same reasons as are listed above. This Court noted that, although the motion was granted because the Complaint therein had not been timely filed, the action could have been dismissed on most if not all of the other grounds. In addition, the plaintiff was chastised in the strongest language for his "preposterous" demands and his "frivolous" action. Order of September 9, 1986. This did not deter the plaintiff who promptly moved for reconsideration. At the time that motion was decided he was

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[1]CIV-85-746E.

again reminded that his Complaint was considered to be without merit and that he was spared sanctions only due to his pro se status.

This action is yet another attempt to bring the same clamins before this Court. The events upon which they are based occurred more than seven years ago. They are therefore barred by the applicable statute of limitations[2] and the defendants' other arguments, which once again appear valid, need not be considered.

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[2] Although the plaintiff does not expressly deem his action to be pursuant to the Civil Rights Act, this Court will construe it to be so inasmuch as he protests that his due process and equal protection guarantees were violated. The Statute of limitations in this Circuit for actions brought under 42 U.S.C. §1983 is three years. Okure v. Owens, 816 F.2d 45 (2d Cir. 1987).

A party's entitlement to his day in court must not work to place an endless burden on his opponent to answer to repeat attempts to press the same claim. In view of the explicit warnings which have already been addressed to the plaintiff, it is not inappropriate to require him to bear the burden of this motion.

Accordingly, the defendants' motion to dismiss the Complaint and for attorney's fees is hereby ORDERED granted. The defendants shall submit an affidavit and detailed time schedule in support of their request for fees within 15 days of the filing of this Memorandum and Order.

Dated: Buffalo, NY
October 2, 1987

U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MAJORITY STOCKHOLDER OF WEAVER MFG.INC., AND MAJORITY STOCKHOLDER OF 991 AERO DRIVE,INC.,et al.,

Plaintiff,

-vs-

THE STATE OF NEW YORK, DEPART OF LAW,

Defendants.

CIV-87-293E

MEMORANDUM and ORDER

This Court's Orders in CIV-85-746E, an action brought by these same plaintiffs against these same defendants and others, dismissed to alter that dismissal upon reconsideration. Their attempt to bring the same claims before this Court in the instant action was recognized as such and the Complaint was dismissed by this Court's Order dated October 2, 1987 and filed October 5th. Undaunted, the plaintiffs have moved for

reconsideration.[1] The supporting papers fail entirely to provide a meritorious argument. The motion to reconsider the Order are to be denied.

The Attorney General's office, which represents the defendants, had asked for an assessment of attorney fees against the plaintiffs on this repetitive litigation. Such was granted in and by said Order. That office now has submitted an affidavit documenting 6 hours and 55 minutes[2] of time expended in the instant litigation. An hourly rate of $150 is requested. Although this rate may not be unreasonable

[1] One such motion was filed October 14, 1987; an identical motion was filed December 14, 1987. The plaintiffs' motion to correct the transcript was withdrawn at the time of oral argument, November 9, 1987.

[2] Although compensation for 7 hours was requested, only 6 hours and 55 minutes are accounted for on the submitted "Time and Activity Record."

compared to those charged by private sector attorneys of comparable experience in this locality, the arguments made on behalf of the defendants were so obvious and the defendants' position so clearly meritorious that an hourly rate of $75 is deemed more appropriate.

Accordingly, it is hereby ORDERED that the plaintiff's motions to reconsider are denied and that the plaintiff shall reimburse the State of New York for attorney's fees in the amount of $518.75.[3]

Dated: Buffalo, NY
February 5, 1988

U.S.D.J.

[3] The plaintiffs' October 14th motion was heard and submitted November 9th and their December 14th motion was heard and submitted December 29th. The presiding judge was absent from the Western District of New York from and after January 3, 1988 to and including January 30th. On February 1st a letter came to chambers via the United States mails from plaintiff Sheldon H. Weaver. The letter, although dated February 1st, was postmarked January 29th. Therein Mr. Weaver seeks a prompt disposition of his motions so that he might be entitled to appeal form anticipated adverse rulings.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHELDON H. WEAVER, Individually and majority stockholder (75%) of the two mentioned corporations listed in this caption; DIANE D. WEAVER, Individually and a minority stockholder (25%) of the two mentioned corporations listed in this caption; WEAVER MFG. CO., INC.; JEFFREY SCOTT WEAVER, CAROLINE ANN WEAVER, minor children of the marriage of the above Diane C. Weaver and Sheldon H. Weaver; APPROXIMATELY (35) THRITY-FIVE CREDITORS of Weaver Mfg.Co., Inc., and minority creditors of 991 Aero Dr. Inc.; JOHN or JANE DOE (a fictitious name, a plaintiff or unknown party which could become an interested party).

Plaintiffs,

-vs-

THE STATE OF NEW YORK, Department of Law; JAMES L. KANE; HODGSON,RUSS, ANDREWS, WOODS & GOODYEAR and WILLIAM H. GARDNER; CUNNINGHAM, FARES AND RENDA and JAMES P. RENDA; RICHARD or MAARY ROE (a fictitious name representing any person acting in concert, or responsible for the acts of the Defendants).

Defendants

The plaintiffs[1] allege violations of their due process rights under both the federal and the New York Constitutions stemming from certain divorce proceedings in New York State Supreme Court. The defendants have moved to dismiss on a number of grounds including failure to conform the proceedings to the applicable statue of limitations, lack of jurisdiction, failure to state a claim, res judicata, collateral estoppel and other arguments having to do with various of the plaintiffs and the attempt to bring this suit as a class action.

The Complaint is lengthy and generally difficult to follow. At places it is

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1 The plural usage is not intended to indicate a plurality of properly named plaintiffs, but merely reflects the caption as set fourth in the Complaint. There is ample reason to conclude that Sheldon H. Weaver is the only proper plaintiff in this case indeed, the first

(Footnote continued)

incomprehensible. (The claims, such as they are, would appear to be available pursuant to 42 U.S.C. §1983.) (Although the plaintiffs do not cite to that statute,)(passing references are made to the Fourteenth Amendment to the United States Constitution, deprivations of civil rights and actions under color of state law.) The gist of the Complaint is that James L. Kane, Esq., while he occupied the position of Justice of the Supreme Court of the State of New York, acted improperly during the course of divorce proceedings between Sheldon H. Weaver ("Sheldon") and Diane C. Weaver ("Diane") in proceedings in that Court

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(Footnote continued)
paragraph of the Complaint identifies "Sheldon H. Weaver, acting pro-se" but no comparable reference is made to the other so-called plaintiffs although less specific reference is made to them elsewhere in the Complaint. This Court need not and will not reach that issue at this time -- hence, the use of the plural form.

over which he presided,2 and (that Sheldon's attorneys and Diane's attorneys variously conspired and acted in connection with such proceedings in manners which deprived the plaintiffs of their due process rights.)

A careful review of the Complaint indicates that whatever causes of action the plaintiffs may have had against the various defendants had accured no later than July 12, 1981 at which time there was a stipulated substitution of counsel for Sheldon's then attorney, defendant William H. Gardner, Esq. It is apparent, moreover, that the events of which the plaintiffs complain occurred well prior to

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2 (Justice Kane's judgement of divorce was affirmed with modifications and a temporary restraining order which had been entered by him was continued in Weaver v.Weaver, 78 A.D. 2d 771, 433 N.Y.S. 2d 654 (4th Dep't 1980).

this time, that the plaintiffs were aware of the relevant circumstances and in a position before July 17, 1981 to raise all of the claims raised herein. Although the Complaint makes passing reference to subsequent litigation brought by Sheldon in state court largely against the same parties, no specific complaints are made re any purported impropriety in the course of such subsequent litigation (notwithstandng certain vague references made in the plaintiffs' belatedly filed response to the defendants' motion).[3] Claims under section 1983 are to be characterized as personal injury actions

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3 (The plaintiffs have in their response requested leave to amend "or whatever the Court deems fits.") (This Court's policy, normally and consistent with the liberal standard of Fed. R.Civ.P rule 15, is to allow amendments.) In this case, however, the plaintiffs have made absolutely no showing that such amendments would

(Footnote continued)

for statute of limitation purposes. Wilson v. Garcia, _____U.S._____, 105 S. Ct. 1938 (1985). Thus,the applicable period in this case is either three years for personal injury actions in general, as set forth in section 214(5) of New York's Civil Practice Law and Rules, or one year for intentional torts as set forth in section 215(3).) Under the interpretation most generous to the plaintiffs,the time to file this action expired in July 1984. The present Complaint was file this action expired in July 1984. The present

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(Footnote continued)
bear upon the result herein. Thus this Court does not deem it fit to prolong this matter. (Such conclusion, of course, is always subject to reconsideration upon an appropriate showing by the plaintiffs.) It is however noted that, while this Court has not awarded fees and costs on the present motion, the plaintiffs' pro se status undoubtedly will not serve as a shield in the event a prolongation of this action should be attempted and found to be frivolous or ill-founded.

Complaint was filed June 11, 1985. The matter is time-barred.[4]

It should be noted that, although (this Court has chosen not to explore in detail the other bases for dismissal urged by the defendants, it is apparent that the Complaint could have been dismissed on most, if not all, of the previously enumerated grounds. There is every indication that this case is little more than an effort by one party -- Sheldon H. Weaver -- to vent his spleen at a series

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4 Despite its tardiness this Court has received and considered the plaintiffs' Memorandum of Law dated March 7, 1986. Such memorandum adds little to previous submissions. However this Court notes the plaintiffs' effort to argue an equitable tolling of the statute of limitations on the theory that the defendants' purported conspiracy had been continuous and/or that it had been concealed from the plaintiff. The only apparent basis for the continuous conspiracy notion (gleaned from the Complaint rather than from the Memorandum where it was not specifically addressed) is the state court litigation between the parties which has been discussed previously. While a defendant's fraudulent concealment of a wrong may toll the statute of limitations in a section 1983 action, Keating v. Carey, 707 F.2d

(Footnote continued)

of state court decisions adverse to him but competently reached. Such is borne out, for example, by the preposterous prayer for relief in which the plaintiffs seek $224 million in damages and by the aspects of the Complaint in an attempt to ascertain and to understand fully the arguments made therein, but sees no useful purpose to be served by examining in detail the defendants' further legal contentions inasmuch as the statue of limitations analysis is dispositive. Given the plaintiffs' "pro se" status, and evident

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(Footnote continued)
377,382 (2d Cir. 1983), the plaintiffs have set forth no factual predicate for such a conclusion. Indeed the plaintiffs' argument (to the extent it rises to such) that they were aware of the existence of the alleged wrong is apparently belied by their bringing of the state court actions subsequent to the initial divorce

lack of legal acumen as a possible explanations for the bringing of this apparently frivolous action, no fees or costs will be awarded at this time. Accordingly, it is hereby ORDERED that the defendants' motions to dismiss are granted and that the Complaint is dismissed.

Dated: Buffalo, NY

September 9, 1986

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-85-746E

SHELDON H. WEAVER, Individually and majority stockholder (75%) of the two mentioned corporations listed in this caption; DIANE D. WEAVER, Individually and a minority stockholder (25%) of the two mentioned corporations listed in this caption; WEAVER MFG. CO., INC.; 991 AERO DR., INC.; JEFFERY SCOTT WEAVER, CAROLINE ANN WEAVER, minor children of the marriage of the above Diane C. Weaver and Sheldon H. Weaver; APPROXIMATELY (35) THIRTY-FIVE CREDITORS of Weaver Mfg. Co.,Inc., and minority creditors of 991 Aero Dr., Inc.; JOHN and JANE DOE (a fictitious name, a plaintiff or unknown party which could become an interested party),

Memorandum

Plaintiffs,

-vs-

THE STATE OF NEW YORK, Department of Law; JAMES L. KANE; HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR and WILLIAM H. GARDNER; CUNNINGHAM, FARES AND RENDA and JAMES P. RENDA; RICHARD or MARY ROE (a fictitious name representing any person acting in concert, or responsible for the

acts of the Defendants),

Defendants

Having dismissed this plaintiff's action by Memorandum and Order dated September 9, 1986 and having denied the plaintiff's petition for reconsideration, this Court deems the plaintiff's "Motion to seek Discovery and or a Evidentiary Hearing" filed December 23, 1986 to be inappropriate.

Dated: Buffalo, NY
December 31, 1986

U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-85-746E

SHELDON H. WEAVER, Individually and majority stockholder (75%) of the two mentioned corporations listed in this caption; DIANE D. WEAVER, Individually and a minority stockholder (25%) of the two mentioned corporations listed in this caption; WEAVER MFG. CO., INC.; 991 AERO DR., INC.; JEFFERY SCOTT WEAVER, CAROLINE ANN WEAVER, minor children of the marriage of the above Diane C. Weaver and Sheldon H. Weaver; APPROXIMATELY (35) THIRTY-FIVE CREDITORS of Weaver Mfg. Co.,Inc., and minority creditors of 991 Aero Dr., Inc.; JOHN and JANE DOE (a ficitious name, a plaintiff or unknown party which could become an interested party),

Memorandum

Plaintiffs,

-vs-

THE STATE OF NEW YORK, Department of Law; JAMES L. KANE; HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR and WILLIAM H. GARDNER; CUNNINGHAM, FARES AND RENDA and JAMES P. RENDA; RICHARD or MARY ROE (a fictitious name representing any person acting in concert, or responsible for the

acts of the Defendants),

Defendants

Plaintiff Sheldon H. Weaver seeks a reconsideration of the Order and Judgement of this Court filed September 10, 1986 granting the defendants' motions to dismiss.

The Complaint had alleged due process violations under both the federal and New York Constitutions arising from a certain divorce action in New York State Supreme Court. Although the defendants cited numerous grounds upon which to dismiss -- eg., the applicable statute of limitations, lack of jurisdiction, failure to state a claim, res judicata, collateral estoppel --, the Complaint was dismissed on the first of these. This Court pointed out, however, that the Complaint would have been dismissed on most, if not all, of the above cited grounds.

Additionally, this plaintiff was

chastised for using this Court as a forum in which to vent anger over adverse, though competent, state court decisions. Recognizing his pro se status, this Court pardoned bringing this "frivolous" action by awarding no fees or costs to the defendants. Nevertheless, he has deemed it necessary to pursue this action further by seeking a reconsideration.

At oral argument he attempted to present additional facts which he contends were not before this Court when it reached its decision. In actuality, he has offered nothing to strengthen his position. Accordingly, it is hereby ORDERED that said plaintiff's motion for reconsideration is denied.

Dated: Buffalo, NY
December 31, 1988

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WEAVER MANUFACTURING INC., etc.,
Plaintiffs,

v. CIV-87-31C

CUNNINGHAM, etc., et al.,
Defendants

The plaintiffs have filed a complaint pursuant to 28 U.S.C. §1352, along with an application to proceed in forma pauperis pursuant to 28 U.S.C. §1915(d). Permission to proceed in forma pauperis is granted, however, the complaint is dismissed. Although plaintiffs assert that federal questions exist, I find the complaint simply consists of a lawsuit against the plaintiffs' former attorneys. As all parties are residents of New York State, no diversity exists. Furthermore, the complaint ought to be dismissed for failure to comply with Rule 8 of the

Federal Rules of Civil Procedure.

Finally, my review of the complaint leads me to conclude that it is frivolous in nature; therefore, the plaintiffs shall not be allowed to submit an amended complaint.

If plaintiff wishes to file a notice of appeal, he must do so within thirty days of the entry of the judgement by filing with the Clerk of the U.S. District Court, U.S. Court House, Buffalo, New York 14202. The $5.00 filing fee is waived.

Permission to appeal in forma pauperis is denied. Further requests for permission to appeal in forma pauperis should be directed, on motion, to the U.S. Court of Appeals, U.S. Court House, Foley Square, New York, New York 10007, in accordance with the requirements of Rule

24(a) of the Federal Rules of Appellate Procedure.

So ordered.

Dated: January 29, 1987

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CIV-87-293E

Proceedings held before the HONORABLE JOHN T. ELFVIN, in United States District Court, Western District of New York, Part II, on July 28, 1987.

APPEARANCES: SHELDON WEAVER,
Pre Se.
NEW YORK STATE DEPARTMENT OF LAW
BY: PATRICK O. MC CORMACK, ESQ.,
65 Court Street,
Buffalo, New York 14202
(716) 847-7177

EDNA J. PACZYNSKI
Official Reporter
508 United States Courthouse
Buffalo, New York 14202
(716) 856-1144.

MR. WEAVER:

Good afternoon, Your Honor.

Your Honor, with all due respect, no subsequent action relieving, the Government, the State of New York, of its duty to provide compensation for the period that the injunctions and their certain restraints took effect until this Court determines whether those injunctions and their certain restraints were wrongfully issued, and if the remedy was abused.

Your Honor, with all due respect. Referring to the Plaintiff's allegations beginning with paragraph nine and ending with paragraph twenty-two, surely it's not lengthy Complaint, difficult to follow, or at times to be incomprehensible, but clearly shows facts that from the

beginning to the end of the ex parte judicial process of enjoining corporations and suspending and prohibiting their normal ordinary business matters with an individual defendant in a separate and distinct action, a matrimonial action, was totally absent of any legal notices, bonds or security, hearings or trials, or an opportunity to be heard or defended, and the entering and enforcing judgments, orders and decrees, containing provisions of temporary and permanent restraints of unconstitutional prohibitions prohibiting statutory rights, and vague restraints and indifferent restraints from the beginning to the end against absent parties is not due process of law nor equal protection of and under the laws, and include a blueprint of fraud upon the owners of the corporation in issue, and those

constitutional, statutorial and jurisdictional defects can never be waived.

Your Honor, with all due respect. Those activities, but just not limited to those activities, have already directly or indirectly caused to work in a domino effect, taking and depriving the full use, possession, and ownership of tangible and intangible property from the Plaintiffs and other stockholders and creditors who have a common interest in the same property, who are the complete owners of the corporations in issue, resulting in substantial monetary damages.

Your Honor, with all due respect. Under such activity and circumstances, the property clauses of the 5th and 14th Amendments of the United States Constitution clearly requires and demands

the Government, the Defendant, the State of New York, provide just compensation for the taking or causing the taking of property and depriving persons of their property without due process of law and equal propection of the laws of persons within their jurisdiction.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AFFIDAVIT

MAJORITY STOCKHOLDER OF WEAVER MFG.INC., AND MAJORITY STOCKHOLDER OF 991 AERO DRIVE,INC.,et al.,

CIV-87-293E

Plaintiff,

-vs-

THE STATE OF NEW YORK, DEPART OF LAW,

Defendants.

STATE OF NEW YORK)
COUTY OF ERIE) SS:
CITY OF BUFFALO)

SHELDON H. WEAVER, being duly sworn deposes and states:

A. This affidavit is being prepared in advance for the up coming oral argument on November 9, 1987 for reconsideration.

1. With all due respect Your Honor, paragraph one (1) of eight (8) paragraphs. I am here today to ask you to reconsider your decision dismissing my action pursuit to section 42 USCA 1983 and to correct the

transcript in issue.

2. The Plaintiffs suit is predominantly based soley on the provision of the fourteenth amendment of the United State Constitution, to which the Defendants are sueable in federal court.

3. The clear implications of the Government grants a right to maintain an action for a wrongfully issued injunction pursuit to the liberal construction of the federal statute 28 USCA 1352 and other sections, to which the Defendants are also sueable in federal court.

4. Congress has held that State Governments were not classified as "persons" who were sueable under the 42 USCA 1983.

5. That section 1983 creates a cause of action against "persons" who deprive others of federally guaranteed rights.

6. Although suits against the states are permissible in federal courts pursuant to 1983, but only to the extent by naming a State of Official as a defendant, of which the Plaintiffs have not.

7. Therefore, the federal Statute 42 USCA 1983 lacks constitutional statutory authority to be relied on to dismiss the Plaintiffs action against the Government, the State of New York, the only real party in interest here today as a Defendant.

8. There are sufficient facts of the activities of the courts of New York State, its decrees mention here before to constitute a Government action under the fourteenth amendment. Therefore, the Plaintiff's rights must prevail for we have a constitutionally protected freedom of action which can not be defeated or disregarded by the defendants or this

court.

Sworn to before
me this 9 day
of October 1987
November

SHELDON H. WEAVER
153 E. HAZELTINE AVENUE
KENMORE, NY 14217
(716) 876-0836

QUESTION (1) ONE

ARE THERE SUFFICIENT FACTS OF THE ACTIVITIES OF THE COURTS, ITS AGENTS OF NEW YORK STATE AND THEIR DECREES TO CONSTITUTE A GOVERNMENT (STATE) ACTION UNDER THE PROVISIONS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

QUESTION (2) TWO

DOES THE EX PARTE JUDICIAL PROCESS OF THE INJUNCTIONS AND THEIR DECREES CONTAINING CERTAIN RESTRAINTS CONSTITUTE AN ACTIVITY THAT HAS ALREADY WORKED AS A TAKING OF LIBERTY OR PROPERTY OR THE USE OF PROPERTY TO WHICH THE GOVERNMENT (STATE) CAN NOT BE RELIEVED OF ITS DUTY TO PROVIDE JUST COMPENSATION WITH IN THOSE PROVISIONS OF

THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

QUESTION (3) THREE

DOES THE FEDERAL STATUTE 42 USCA 1983 HAVE CONSTITUTIONAL, STATUTORY AUTHORITY TO BE RELIED ON TO DEFEAT A GOVERNMENT (STATE) ACTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-580

In The

Supreme Court of the United States

October Term, 1988

SHELDON H. WEAVER, et al.,

Petitioner,

- against -

STATE OF NEW YORK, DEPARTMENT OF LAW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS INVOLVED

1. Whether this action, arising out of a State court order rendered in 1979, is time-barred as a claim under 42 USC § 1983.

2. Whether, in any case, the complaint states a valid claim against the defendant, the State of New York, based on the official actions of a State judicial officer.

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No. 88-580

In The

Supreme Court of the United States

October Term, 1988

SHELDON H. WEAVER, et al.,

Petitioner,

- against -

STATE OF NEW YORK, DEPARTMENT OF LAW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Petitioner seeks a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered in this action on June 21, 1988, affirming unanimously, the order of the United States District Court, Western District of New York, which dismissed his complaint as time-barred.

STATEMENT OF THE CASE

The present action has its roots in a 1978 action for divorce in New York State Supreme Court, Erie

County, brought against Sheldon Weaver by his then wife, Diane Weaver. The principal assets of the marriage included the ownership of two family corporations—Weaver Manufacturing Inc. and 991 Aero Drive Inc.

During the pendency of that action, Mrs. Weaver sought and obtained an order to show cause from State Supreme Court Justice James L. Kane; the order, dated August 8, 1979 temporarily restrained a stockholders' meeting of Weaver Manufacturing Inc., and the proposed transfer of 100 additional shares of stock to Mr. Weaver in exchange for the cancellation of a debt owed him by the corporation. Mrs. Weaver maintained that the cancellation of the debt to Mr. Weaver was intended to shield his assets from the application of court orders for support, alimony and counsel fees. *See* Decision and Order A-11 *et seq.*[1]

By order dated October 10, 1979, Justice Kane granted Mrs. Weaver's motion and continued the terms of the temporary restraining order "until judgment in the divorce case * * * is finalized by voluntary compliance of the parties or after appeal, should either party do so". A judgment of divorce in favor of Mrs. Weaver was granted on October 11, 1979 and entered in the Erie County Clerk's Office on October 12, 1979. Mr. Weaver appealed that judgment to the Appellate Division of the Supreme Court, Fourth Judicial Department, which modified it in relation to the amounts of alimony and child support, and otherwise affirmed. In addition, the Appellate Division continued the temporary restraining order in relation to the transfer of corporate assets "until defendant has made

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1 References are to pages of the appendix to the petition.

all payments presently due under the judgment, at which time he may move to vacate the injunction". *Weaver v Weaver*, 78 AD2d 771 (4th Dept 1980).

Thereafter on June 11, 1985, an action was brought in the United States District Court, Western District of New York, by Sheldon H. Weaver, individually and as majority stockholder of the above-mentioned corporations, and also naming his wife, children and creditors of the corporations as plaintiffs, against the State of New York, Justice Kane and both law firms and attorneys who represented the parties in the divorce action. CIV-85-746E. The gist of the complaint was that Justice Kane, as an agent of the State, and the attorneys for the parties had conspired among themselves to act and make decisions in the divorce action which were financially ruinous to the corporations and their stockholders—principally Mr. Weaver. Thus, it was alleged the plaintiffs were deprived of property without due process of law and without compensation.

The defendants moved to dismiss the complaint on various grounds, including timeliness, lack of jurisdiction, failure to state a claim, res judicata, collateral estoppel and judicial immunity. By decision dated September 9, 1986, Hon. John T. Elfvin, District Judge, determined that the complaint attempted to state a cause of action under 42 USC § 1983 and granted the motions to dismiss the action as time-barred (A11-19). Judge Elfvin added, however, "that the Complaint could have been dismissed on most if not all, of the previously enumerated grounds" (A-17). He observed also, in a footnote, "that Sheldon H. Weaver is the only proper plaintiff in this action" (A12-13 n).

Mr. Weaver promptly moved for reconsideration of that order. Judge Elfvin denied the motion by memorandum and order dated December 31, 1986, stating that he "[had] offered nothing to strengthen his position" (A23-24). No appeal was taken from the dismissal of that action.

The action now under consideration (CIV-87-293E) was begun in March 1987, by Mr. Weaver individually and in his capacity as majority stockholder of Weaver Manufacturing Inc. and 991 Aero Drive Inc., against the State of New York. The State filed a motion to dismiss the new complaint on May 18, 1987, on the same grounds as previously and, in addition, cited the dismissal of essentially identical claims in the prior action. Judge Elfvin granted the motion in a memorandum and order dated October 2, 1987 and again dismissed the action as time-barred (A4-7). Mr. Weaver thereupon filed two separate but identical motions for reconsideration on October 14, 1987 and December 14, 1987. Both motions were denied in a memorandum and order dated February 5, 1988 (A8-10). The Second Circuit affirmed the dismissal and the award of costs to respondent in the order dated June 21, 1988 (A1-3).

ARGUMENT

THIS COMPLAINT IS TIME-BARRED AND OTHERWISE FAILS TO STATE ANY BASIS FOR RELIEF.

A

The essence of petitioner's complaint is that an injunction granted in a divorce action by a state judge was improperly issued and constituted a taking of property

without due process of law or just compensation, and an impairment of contract rights. He seeks "damages" of an unspecified nature.

As Judge Elfvin observed in his memorandum and order of September 9, 1986, the initial complaint could have been dismissed on most, if not all, of the grounds urged by the defendants. He elected to dismiss it as time-barred. The injunction at issue was granted on August 8, 1979 and was continued in the final judgment of divorce granted on October 12, 1979. On appeal by Mr. Weaver (petitioner here) to the Appellate Division, Fourth Department, from the judgment of divorce, the Court reviewed and continued the injunction until such time as he satisfied his financial obligations to his wife and children. That order was issued on October 24, 1980.

Petitioner's first action in federal court was commenced on June 11, 1985, more than five years after the injunction was first granted. Because the complaint alleged violations of due process rights under both the Federal and New York State Constitutions, but did not precisely state its jurisdictional basis, Judge Elfvin concluded that it appeared to be a claim under 42 USC § 1983. He determined that the claim was time-barred and dismissed it.

In his opposition to the motion to dismiss, petitioner argued that the statute of limitations should be tolled equitably on the ground that the wrong was a continuing one and that it was the result of a conspiracy to conceal it from him. Judge Elfvin rejected this argument, in a footnote to his decision, as follows:

> "The only apparent basis for the continuous conspiracy notion (gleaned from the Complaint rather than from the Memorandum where it was not specifically addressed) is the state court litigation between the parties which has been discussed previously. While a defendant's fraudulent concealment of a wrong may toll the statute of limitations in a section 1983 action, *Keating v. Carey*, 707 F.2d 377, 382 (2d Cir. 1983), the plaintiffs have set forth no factual predicate for such a conclusion. Indeed the plaintiffs' argument (to the extent it rises to such) that they were unaware of the existence of the alleged wrong is apparently belied by their bringing of the state court actions subsequent to the initial divorce proceedings."

As noted earlier, petitioner did not appeal from that decision and order, either before or after reconsideration was asked and denied. Judge Elfvin also dismissed the second action, likewise as untimely.

Clearly, petitioner was aware of the injunction from the time he was first served with the order to show cause in August 1979. Both he and his attorney submitted affidavits in opposition to the motion, citing a lack of jurisdiction over the corporations; he then took an appeal to the Appellate Division, which upheld and continued the injunction.

Although the statute of limitations for section 1983 actions is the most nearly appropriate state limitation period, federal law determines when a claim accrues. *Wilson v Garcia*, 471 US 261 (1985); *Okure v Owens*, 816 F2d 45 (2d Cir 1987), *cert granted*, March 21, 1987. In New York, the appropriate period of limitations is no more than three years. *Okure, supra;* CPLR 214(5). The claim arises when the person alleging injury knew or had reason to know of his injury. E.g., *Pauk v Board of Trustees, City*

University of New York, 654 F2d 856, 859 (2d Cir. 1981). The implication that petitioner was somehow prevented, by an alleged conspiracy among counsel and the court, from knowing that he had a legal means to challenge the injunction is not supported by any evidence and is belied by the fact that he did indeed take an immediate appeal to the Appellate Division. *Cf. Keating v Carey*, 706 F2d 377, 382 (2d Cir 1983). There is no basis here for an equitable tolling of the limitation period.

As has been argued in the pending *Okure* case, the State believes that the most analogous statute of limitations in New York is in the one-year provision contained in CPLR 215(3). The present claim is barred under either provision.

B

As indicated above, petitioner did not appeal from the dismissal of his first action in federal court. Instead, he commenced a second action, based on the same circumstances and for the same relief, with a change in the names but not the identity of the parties plaintiff. In this action, only the State remains as a defendant. Judge Elfvin dismissed the second action in his memorandum of October 2, 1987, with this statement:

> "This action is yet another attempt to bring the same claims before this Court. The events upon which they are based occurred more than seven years ago. They are therefore barred by the applicable statute of limitations [footnote omitted] and the defendants' other arguments, which once again appear valid, need not be considered."

Understandably, petitioner does not deny that the second action is a continuation of the first. He simply describes it as a "similar complaint" (A11).

He maintains, however, that this action is not one under section 1983, but rather under 28 USC § 1352. That section is entitled "Bonds executed under federal laws". He does not explain the connection between section 1352 and this case and defendants cannot discern any. In any event, if any cause of action existed other than under section 1983, petitioner was bound to assert it in his original action, or be precluded from doing so. Thus, not only is petitioner precluded by the state judgment affirmed on appeal, but also by his failure to assert the claim in his first federal action. *Kremer v Chemical Construction Corp.*, 456 US 461 (1982); *LaRocca v Gold*, 662 F2d 144 (2d Cir 1981); *Gramatan Home Investors Inc. v Lopez*, 46 NY2d 181 (1979).

There are, as Judge Elfvin noted, other valid defenses to this action which were not addressed in his decision. First, by virtue of the Eleventh Amendment, the federal courts lack jurisdiction to grant a money judgment against the defendant, the State of New York. *Edelman v Jordan*, 415 US 651 (1974); *Ford Motor Corp. v Department of Treasury*, 323 US 459 (1945). The claim in the prior action, against State officials, was also against the State of New York. *Pennhurst State School and Hospital v Halderman*, 465 US 89 (1984).

Nor could the petitioner maintain an action against Justice Kane in his official capacity. Judges are absolutely immune from claims for monetary damages for their judicial acts. *Stump v Sparkman*, 435 US 349 (1978); *Pierson v Ray*, 386 US 547 (1967).

C

For the foregoing reasons, respondent submits that the complaint was properly dismissed as time-barred and was also subject to dismissal on other grounds as well. The order of the District Court was properly affirmed by the Second Circuit Court of Appeals. The petitioner here has failed to advance any serious legal argument in opposition to the order of the Second Circuit, or to establish that the matter is of legal significance. Although he continues to argue that the 1979 state court injunction constituted an illegal "taking" of his property, he fails totally to address the crucial issue of timeliness or any of the other legal objections (e.g., immunity) raised by the defendant below. Consequently, no further review is warranted.

———o———

CONCLUSION

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent

O. PETER SHERWOOD
Solicitor General
and Counsel of Record

PETER H. SCHIFF
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JOHN Q. DRISCOLL
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